Supreme Court, U.S.
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No. 00-0618

In The

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

v.

MICHAEL JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

TABLE OF CONTENTS

	Page
STATUTORY PROVISIONS INVOLVED	1
I. COUNTERSTATEMENT OF THE CASE	3
A. Preliminary Statement	3
B. Counterstatement Of Facts	3
1. "Investigation and Development" of the Penalty Phase Strategy by Petitioner's Trial Counsel	3
2. The Prejudicial Failure to Investigate the State's Case for "Aggravation" in the Penalty Phase	6
3. The Prejudicial Failure to Prepare or Present an Affirmative Penalty Phase Case	8
II. REASONS TO DENY PETITION	14
A. The Ninth Circuit's Decision On The Penalty Phase Was Based On A Standard *Strickland* Analysis	14
B. Nothing In The Ninth Circuit Decision Violated The Anti-Retroactivity Doctrine Of *Teague v. Lane*	17
III. CONCLUSION	18

APPENDIX INDEX

Page

A. Narrative Statement of Dr. Orm Aniline ...App. 1

B. Testimony of Dr. Orm Aniline .....App. 28

C. Testimony of Dr. Orm Aniline .....App. 32

D. Narrative Statement of Leslie Abramson ...App. 42

TABLE OF AUTHORITIES

Page

CASES

Herrera v. Collins, 506 U.S. 390 (1993) 9

Strickland v. Washington, 466 U.S. 668 (1984) 3, 14, 15, 16, 17, 18

Teague v. Lane, 489 U.S. 288 (1989) 17, 18

STATUTES

California Penal Code Section 29.....1, 11

California Penal Code Section 190.3.....1, 6, 7, 8, 11

STATUTORY PROVISIONS INVOLVED

California Penal Code Section 29:

> ***"In the guilt phase of a criminal action,*** any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Emphasis added.)

California Penal Code Section 190.3 (relevant portions):

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence, which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.
>
> ***However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve***

the express or implied threat to use force or violence."

. . . .

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(h) ***Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired*** as a result of mental disease or defect, ***or the affects of intoxication.***" (Emphasis added.)

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Michael Anthony Jackson opposes a petition for a writ of certiorari to review the penalty phase decision of the United States Court of Appeal for the Ninth Circuit reached by Judges Canby and Thomas, with a dissent by Judge O'Scannlain.

I. COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

Petitioner's assertion that the Ninth Circuit applied a new and novel "per se rule of deficient performance and prejudice"[1] is simply wrong. The majority opinion reached its decision on the penalty phase, through a straightforward application of the legal principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to a truly egregious set of facts. In fact, as will be set forth below, petitioner can only argue to the contrary by ignoring the actual performance of respondent's trial counsel and the prejudice to respondent established as a matter of fact and law on the record below.

B. Counterstatement Of Facts

1. "Investigation and Development" of the Penalty Phase Strategy by Petitioner's Trial Counsel

William Klump was appointed to represent respondent on September 8, 1983, eight days after respondent

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[1] Petition, p. 13.

was arrested. The penalty phase in respondent's trial started on April 16, 1984, over seven months later. As established in the District Court through the testimony and time sheets of Klump's own investigator, through the investigation files of the Public Defender, and through Klump's own testimony, the entire penalty phase investigation during this seven-month period took two hours and ended on January 9, 1984, over two months before the commencement of the guilt phase of the trial.

At the evidentiary hearing, Robert Bund, Klump's investigator testified that he kept having conversations with Klump "in regards to when we were going to start the penalty phase and when we would be talking to the defendant and the defendant's relatives." That effort, as he testified, simply kept being "postponed and postponed." Bund had "concerns that we weren't doing enough for the penalty phase," and that "it is the practice within the Public Defender's Office to start from the very beginning obtaining information for the penalty phase." Being "very concerned," Bund expressed his concerns to Klump and said "that we should be talking to the defendant." Klump never responded: "He just kind of put me off." Apparently, this was because Klump thought a case involving a "tremendous offense" (Petitioner's App. B at p. 44) in which a poor black defendant addicted to PCP had killed a popular young white policeman with the officer's own shotgun was "an easy case." Klump had never tried a penalty phase before, but he was not concerned, testifying that "personally, I didn't think we were going to get that far."

During the entire seven-month period Klump represented respondent, he never visited respondent in the jail

where he was held, never talked to respondent's mother or wife until the day he put them on the stand in the penalty phase, and never either interviewed or made any attempt to investigate the stories of the two witnesses the State called to testify regarding "aggravating circumstances" in the penalty phase of respondent's trial.

Klump clearly contemporaneously recognized the inadequacy of this "preparation" since on February 23, 1984, almost over a month before the start of trial,[2] he assured his superiors that there would be more than adequate time to "fully prepare a penalty phase" since "the trial will take place in a master calendar court where the judge is very lenient about granting extensions for attorneys to prepare their cases." Despite this assurance, the evidence established without contradiction that from this point until the guilty verdict on April 11, 1984, no further investigation was conducted either of the State's penalty phase case or of facts which might support an affirmative penalty phase on behalf of respondent. When the verdict of guilty of first degree murder with special circumstances was returned by the jury late Wednesday on April 11, 1984, and contrary to his assurances to his superiors, Klump did not even attempt to remedy this neglect by requesting a continuance of the penalty phase. Neither he nor his investigator conducted any further investigation. Instead, he simply went forward with the penalty phase on Monday, April 16, 1984.

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[2] Trial commenced on March 19, 1984.

2. The Prejudicial Failure to Investigate the State's Case for "Aggravation" in the Penalty Phase

On February 16, 1984 the District Attorney gave Klump express notice that he would use all prior crimes of respondent and all information contained in respondent's military records at the penalty phase. Despite this fact, Klump admittedly did not instruct his investigator to conduct any investigation of the matters contained in these files or to investigate the specific events testified to by the two witnesses the State ultimately called during the penalty phase.

The prosecutor presented two witnesses in the penalty phase, George Taylor to testify about an alleged act of sodomy that took place many years before and Officer Andrew Bennallack, who testified about an altercation with respondent during an arrest. Neither was interviewed by either Klump or his investigator. Taylor gave testimony corroborated by no other witness about an incident in the Army in which he allegedly had been sodomized by respondent. Officer Bennallack testified that when he arrested respondent for being intoxicated with PCP, respondent made a pushing motion, "just to push me away" at which point Officer Bennallack struck respondent's legs with his baton and then struck respondent in the face with his fist. Officer Bennallack testified that he broke his hand and cracked his wrist as a result of the confrontation with respondent.

California Penal Code Section 190.3 sets forth the standards for the introduction of "aggravating" evidence in a death penalty hearing. Since respondent had never

been charged in the Taylor incident or with respect to the alleged assault and battery on Officer Bennallack, evidence relating to these incidents could only be introduced if they qualified as criminal activities which involved "the use or attempted use of force or violence" or "the expre[illegible] implied threat to use force or violence." (Cal. Penal Code § 190.3.) The evidence – unexamined and uncited by Klump – would in fact have cast serious doubt on whether such "force or violence" was present in either incident.

With respect to Taylor, his story was entirely uncorroborated by any other witness despite the fact that he identified six other people who were present during the alleged incident. Klump testified that he knew there were other witnesses, but he was sure no one interviewed those witnesses "unless the prosecution did." As the Court of Appeals noted, even the testimony submitted "left room for an argument that the sodomy committed by Jackson had not been committed by force or threat of force" (see Opinion at 5009) and medical evidence in the military records from the doctor who examined Taylor after the incident (of which Klump had notice) was directly inconsistent with Taylor's version of the incident. Klump made no effort, however, to either exclude Taylor's testimony under Section 190.3 or even impeach Taylor with this evidence.

The element of force involved in the incident with Officer Bennallack was also subject to challenge. Even by Officer Bennallack's own description, the incident sounded more like an officer mugging respondent rather than evidence of violent criminal activity on respondent's part. Additionally, while Officer Bennallack testified that

he broke his hand and cracked his wrist in the incident, these facts were neither noted in Officer Bennallack's report of the incident, which Klump had, nor in any supplemental injury report. Again, however, Klump did not talk to Officer Bennallack before his testimony, made no attempt to exclude this evidence under Section 190.3, and never even cross examined him on this enhancement of the incident.

3. The Prejudicial Failure to Prepare or Present an Affirmative Penalty Phase Case

There were two critical areas of testimony available to Klump in the penalty phase. The first was psychiatric testimony necessary to give the jury a true understanding of respondent's mental state at the time of the crime.

Contrary to petitioner's claims, the evidentiary hearing established that Klump had available, or could have had available, testimony from three different psychiatrists directly relevant to the question of whether "at the time of the offence the capacity of the defendant to appreciate the criminality of this conduct or to conform his conduct to the requirements of law was impaired as a result of . . . the affects of intoxication." (Calif. Pen. Code § 190.3.)

The report of Dr. Blake Skrdla, the first psychiatrist hired by Klump, included the opinions that "at the time of the alleged offense, [respondent] is believed to have been intoxicated on phencyclidine" and "because of his drug-induced state of intoxication, he is not believed to

have actually deliberated, premeditated, nor meaningfully and maturely reflected upon the gravity of his contemplated acts." The report of Dr. John Mead, the second psychiatrist hired by Klump, included not only the opinion that "at the time of the commission of the alleged offense, Mr. Jackson was grossly intoxicated with PCP. He has little recollection of the day's proceedings," but also the report that respondent "wished he could have a Sodium Amytal interview because he held on to the idea that he would not have ever killed anyone" and that respondent "recognizes that he was helpless in attempting to stop using drugs."

As set forth at length in respondent's petition for writ of certiorari regarding the guilt phase of the trial and the question raised under *Herrara v. Collins*, 506 U.S. 390 (1993),[3] the testimony of Dr. Orm Aniline, the third psychiatrist hired by Klump, established that he also could have offered critically useful testimony had he personally examined respondent.

In attempting to discount the testimony Dr. Aniline could have given, the State both misstates it as being based only on tests not administered in 1983 and claims

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[3] That question is:

"Did the Ninth Circuit deny petitioner due process of law by deferentially reviewing a decision by the District Court that relied on an incorrectly stringent standard of proof to deny a capital habeas corpus petitioner's request for a neurologist and exclude evidence of actual innocence?"

Dr. Aniline was to blame for not undertaking the personal examination of respondent necessary for this testimony. The first claim is rebutted by Dr. Aniline's full Narrative Statement, which shows his opinions were in fact based on his clinical observation of respondent in connection with the evidentiary hearing. This Narrative Statement is attached as Appendix A hereto.[4] The second contention goes, however, to the very heart of Klump's total failure to grasp the significance of psychiatric testimony in respondent's penalty phase.

As Dr. Aniline testified at the evidentiary hearing, Klump told him that he was to provide "kind of generic information on PCP," not to testify on respondent's mental state or condition. This testimony is attached as Appendix C hereto. This was because, at that time, Klump intended to have Dr. John Mead, who had examined respondent, testify. When the Court in the guilt phase subsequently refused to exclude background information in Dr. Mead's report that Klump wanted to use only in the penalty phase, however, he simply abandoned

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[4] In paragraph 2 of that Narrative Statement, Dr. Aniline makes clear that all his opinions were based on his education and clinical experience, scientifically established principles relating to the effects of PCP, and his actual clinical examination of respondent, not on tests that were not administered. Dr. Aniline also made clear in answer to questions from the Court at the evidentiary hearing that the only difference between the opinion he could have given in 1983 (that to a 90% degree of medical certainty, respondent could not deliberate, premeditate, or form the intent to kill at the time of the incident) and his greater assurance at the time of the evidentiary hearing (a 95% degree of medical certainty) was the result of scientific advances in the interim. This testimony is attached as Appendix B hereto.

any effort to present psychiatric testimony on respondent's mental condition at the time of the crime.

The devastating effect of this abandonment on respondent's defense in the guilt phase is demonstrated in respondent's petition already filed in this case. California Penal Code Section 190.3 makes crystal clear, however, that in the penalty phase of the trial one of the principle mitigating factors on which an expert may testify is whether the capacity of the defendant was impaired "as a result of mental disease, defect ***or intoxication***." Klump clearly never understood this difference, or the fact that any prohibition of this testimony under Penal Code Section 29 was expressly limited to "the guilt phase." Klump testified that he did not consider offering psychiatric testimony in the penalty phase because "the guilt phase is over" and the jury "evidentially did not believe that [respondent] was under the influence of PCP." The problem with this "decision" of course is that the only person who testified at respondent's trial that respondent was intoxicated with PCP was respondent himself, which testimony was characterized by the prosecution as manufactured "to beat your case on a PCP defense." Dr. Aniline, the only other witness who testified with respect to PCP, was in the uncomfortable position of being unable to testify to respondent's mental state because he had not been engaged to do so. (See Appendix C hereto.) Klump also testified at the evidentiary hearing that he specifically told Dr. Aniline he would ***not*** ask whether respondent was under the influence of PCP or whether respondent could "premeditate, deliberate and so forth." Klump testified, "I told Dr. Aniline 'I am not going to ask you that.' " Dr. Aniline had therefore

never conducted a personal clinical examination of respondent, which allowed the prosecution to virtually destroy any possible impact of his testimony, even in the guilt phase, on cross-examination.[5]

The Ninth Circuit's conclusion that Klump was prejudicially ineffective in failing to present available psychiatric evidence and failing to understand the law entitling him to do so (see Opinion at 5007-5009) was not only justified, but compelled in these circumstances.

Klump's investigation and consideration of respondent's social history as a mitigating factor was also clearly and prejudicially defective. The only two witnesses Klump put on in the penalty phase were respondent's wife and mother who he interviewed for the first time the day they testified. He "prepared" these witnesses by talking to them for one half an hour on that day and telling them "try to stay away from, shall we say, character. 'He's a good boy' or something like that."[6] He then turned these unprepared and bewildered witnesses

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[5] The prosecutor asked Dr. Aniline: " Have you looked at any background material of defendant?" "You haven't read any medical history?" "Have you asked to see any medical history of defendant?" "Have you interviewed any friends or family or anyone like that that could give you the nature of the defendant's use of phencyclidine before the date in question here?" "Have you done a neurological workup of defendant?" "Have you studied defendant's background at all?" To each of these questions – because Mr. Klump had instructed him not to do any of these things – Dr. Aniline was forced to answer "No."

[6] After giving these "instructions," Klump asked Jackson's wife and mother "what kind of husband was he" "what kind of person is he," eliciting the response "he was nice . . . he's basically a good person."

over to the prosecutor for cross-examination, resulting in testimony on all of the "background" areas covered and Dr. Skrdla's and Dr. Mead's reports (who Klump knew had gotten this information only from respondent's wife and mother).

Since neither Klump nor his investigator had conducted any meaningful interviews of respondent's wife, mother, or any other person who could give an insight into respondent's life, what was not uncovered or presented to the jury included critical facts relating to respondent's social history. The Ninth Circuit, which had an opportunity to review and compare the trial testimony of respondent's mother with her testimony in a deposition taken by petitioner in connection with the evidentiary hearing, found that her testimony alone "presents a very different picture from her testimony at the penalty phase." (See Opinion at 5010.) The same was true of the evidence presented at the evidentiary hearing of the psychological report contained in respondent's juvenile file which Klump claimed he had reviewed, but which he did not present to the jury. That report (Ex. 293), prepared by a psychologist after examining respondent, noted his "early emotional deprivation and inconsistent discipline at home" and expressed great alarm at this pattern continuing. Despite knowledge of this report, Klump neither presented it to the jury nor made any attempt to investigate its findings.

As petitioner notes, respondent also submitted declarations from respondent's family members and a declaration by Dr. Jackman showing mitigation evidence which could have been presented in the penalty phase as a part of respondent's social history. While petitioner notes that

respondent did not offer these declarations for the truth, it neglects to note that the "limited purpose" for which they were offered was to establish that this testimony would have been available to Klump or his investigator if Klump made even a minimal effort to prepare the penalty phase case. Petitioner also fails to note that these declarations were offered in conjunction with the testimony of respondent's *Strickland* expert, Leslie Abramson, who testified that she relied on the declarations in forming the opinion in paragraphs 84 and 85 of her Narrative Statement that Klump's performance in the penalty phase was prejudicially deficient.[7]

With or without these declarations, however, there was clear and sufficient evidence establishing trial counsel's total failure to investigate or present available evidence of respondent's social history. This was both ineffective and prejudicially ineffective assistance of counsel.

II. REASONS TO DENY PETITION

A. The Ninth Circuit's Decision On The Penalty Phase Was Based On A Standard *Strickland* Analysis

Petitioner earnestly attempts to recast the Ninth Circuit's opinion as an unreasoned and unreasonable break with this Court's *Strickland* standards. By misstating the opinion, petitioner sets up a straw man and then knocks it down. But even a brief review of the Ninth Circuit's

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[7] Abramson's Narrative Statement is Appendix D hereto.

penalty phase opinion shows that it in no way departed from *Strickland*.

The Ninth Circuit first found that the "investigation" conducted in the penalty phase – which lasted two hours in the seven months available between Klump's appointment and the trial, and which ended on January 9, 1984, over two months before the guilt phase of the trial even started – was deficient. It is hard to believe that petitioner disputes this conclusion. The Ninth Circuit also found specific areas that Klump should have addressed but didn't. For example, respondent told Klump that the alleged sodomy did not occur as the prosecution contended. The Ninth Circuit recognized that the evidence was at least ambiguous. (See Opinion at 5009.) Despite this, Klump did nothing and the jury was left with unchallenged testimony that Jackson had committed a sexual assault. Tellingly, petitioner does not even mention this aspect of the Ninth Circuit's Opinion.

When petitioner does focus on specific portions of the Ninth Circuit's Opinion, petitioner mischaracterizes them so that they can be more easily challenged. But despite petitioner's efforts the Opinion makes clear the following:

- The Ninth Circuit found that it was unreasonable and prejudicial for Klump to fail to present favorable psychiatric testimony that was clearly available. (See Opinion at 5007-5009.) There was no "background material" in the testimony that was not already available to the prosecution as of the penalty phase. On the other hand, the three psychiatrists could have provided expert testimony

that was significant and favorable. They could have confirmed that respondent testified truthfully when he said that he was intoxicated and that he did not recall the crime. (Opinions of Drs. Mead and Skrdla.) They could have also opined that respondent did not premeditate and deliberate. (*Id.*) Petitioner argues that expert confirmation was unnecessary because respondent himself testified to the same effect. This borders on the ludicrous.

- As to respondent's social history, the Ninth Circuit made clear that it relied on the deposition testimony of respondent's mother given in conjunction with the evidentiary hearing in the District Court. (See Opinion at 5010.) This testimony graphically established what evidence would have been available to Klump if he had done more than talk with respondent's mother for a half hour on the day she testified. (*Id.*) Petitioner also fails to note that the declarations upon which she focuses were relied upon by respondent's *Strickland* expert in support of her opinion that Klump's failure to present social history evidence in the penalty phase was deficient performance which severely prejudiced respondent. Moreover, the Ninth Circuit made clear that the failure to present social history evidence was prejudicial because it occurred in conjunction with Klump's deficient and prejudicial misuse of the psychiatric testimony. (*Id.*)

Petitioner's true objection is not that the Ninth Circuit failed to apply a standard *Strickland* analysis, but that it disagrees with the Ninth Circuit's conclusions based

upon this analysis. One of the basic principles of *Strickland* is that "counsel has a duty to make reasonable investigations or to make a reasonable investigation that makes particular investigations unnecessary." (466 U.S. at 691.) It is hard to believe that petitioner is seriously contending that the two-hour investigation conducted in this case even came close to meeting this standard.

Strickland also holds that in order for ineffective assistance of counsel to entitle a petitioner to habeas relief, that ineffective assistance must be shown to have been prejudicial. By its nature, this analysis is fact and case specific. Here, however, the evidence conclusively established that respondent's trial counsel had available psychiatric testimony which he failed to use solely because he did not understand the law. The uncontradicted evidence before the District Court and the Ninth Circuit also established that important "social history" evidence was available to, but not presented by, respondent's trial counsel solely because neither his two-hour penalty phase investigation in the seven months before trial nor his half hour interview with respondent's mother and wife on the day they testified uncovered this evidence. While petitioner may not like these facts, this unhappiness is scarcely the basis for a petition to this Court.

B. Nothing In The Ninth Circuit Decision Violated The Anti-Retroactivity Doctrine Of *Teague v. Lane*

For the same reasons, petitioner's claim that the Ninth Circuit decision violates *Teague v. Lane*, 489 U.S. 288

(1989), is unfounded and does not merit review. The Ninth Circuit's decision in the penalty phase was based upon a standard *Strickland* analysis applied to the facts found by the Ninth Circuit as a result of its mandated *de novo* review. (See Opinion at 4991-2.) While petitioner may not like the factual conclusions drawn by the Ninth Circuit, this does not convert a traditional *Strickland* analysis into a "new rule" remotely subject to the *Teague* doctrine.

III. CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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